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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-936

EDWARD C. VOLL,

Petitioner,

vs.

DENNIS SHAUL, DIRECTOR OF COMMERCE, DIVISION OF LICENSING, STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH APPELLATE DISTRICT OF OHIO

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STATEMENT OF THE CASE

The Petitioner herein has at all times pertinent hereto been licensed, pursuant to Chapter 4749., Ohio Revised Code, as a private investigator by the State of Ohio through the Division of Licensing of the Department of Commerce.

On April 6, 1973, in The United States District Court for the Northern District of Ohio, the Petitioner, with the assistance of counsel, entered a plea of guilty and was convicted under an indictment for the commission of a felony, to wit: a violation of Title 18, Section 2511 (1) (a), United States Code, for having unlawfully endeavored to intercept wire communications and having procured another person to intercept wire communica-

tions. Pursuant to Section 4749.04 (B), Ohio Revised Code, the license of a private investigator may be revoked in accordance with Ohio's Administrative Procedures Act, *i.e.*, Chapter 119., Ohio Revised Code, upon conviction of a felony. In accordance with these procedures the Petitioner was given the required notice of opportunity for hearing regarding the matter of his suitability to remain licensed as a private investigator. Said matter came on for hearing on May 11, 1973. Prior to the conclusion of said hearing it was continued until September 5, 1973, whereupon said hearing was completed. During these hearings counsel for both Petitioner and Respondent stipulated, *inter alia*, that the Petitioner had in fact been convicted of the abovementioned offense; that such offense constituted a felony; and, that the Respondent had both grounds and the authority to revoke, suspend or refuse to renew Petitioner's license.

The aforementioned adjudication hearing was conducted in accordance with Section 119.09, Ohio Revised Code, and the Respondent herein did appoint, pursuant to this statute, a hearing officer to conduct said hearing. Subsequent to said hearing, the hearing officer submitted his report as described in Petitioner's Statement of the Case. Pursuant to Section 119.09, Ohio Revised Code, the hearing officer's report is to contain his Findings Of Fact, Conclusions of Law and a recommendation as to the action to be taken by the agency. Thereafter, pursuant to this statute the Respondent had a duty to approve, modify or disapprove the recommendations made by the hearing officer. In the instant action, the Respondent issued his Adjudication Order on October 12, 1973. In this Adjudication Order the Respondent revoked the Petitioner's license as a private investigator for the commission and conviction of the aforementioned felony

pursuant to his statutory authority and duty as contained in Section 4749.04 (B), Ohio Revised Code. Contrary to the implications contained in Petitioner's Statement of the Case the Respondent acted as he did for some very substantial and poignant reasons. *See* Respondent's Adjudication Order, *at* page eleven, Petition.

The Petitioner, pursuant to Section 119.12, Ohio Revised Code, appealed the Respondent's Adjudication Order to the Court of Common Pleas of Cuyahoga County, Ohio. On December 21, 1973, the Court of Common Pleas, although it found that the Adjudication Order was supported by the required quantum of evidence, modified the penalty contained in said Order by changing said penalty from revocation of Petitioner's license to a sixty (60) day suspension period.

Thereupon, the Respondent, feeling that this was contrary to Ohio law, timely appealed the judgment of the Court of Common Pleas to the Eighth District Court of Appeals for Cuyahoga County, Ohio. Said Court reversed the lower Court's judgment and reinstated the original Order of the Respondent.

Thereafter, the instant action has proceeded as set out in Petitioner's Statement of the Case.

BRIEF IN OPPOSITION

I. PETITIONER RECEIVED A FAIR AND IMPARTIAL HEARING IN ACCORDANCE WITH SECTION 119.09, OHIO REVISED CODE, WHICH COMPORTS WITH THE UNITED STATES CONSTITUTION AND WHICH GUARANTEED PETITIONER'S RIGHT TO DUE PROCESS OF LAW.

A. INTRODUCTION

At the outset let us review the most pertinent Ohio law involving the obligations of licensed private investigators and the authority and duties of the Respondent in relation thereto. Section 4749.04, Ohio Revised Code, is that law and it provides in pertinent part:

> The grounds for which the director of commerce may revoke, suspend or refuse to renew the license of any private investigator . . . include any of the following:
> . . . (B) Conviction of a felony or crime involving moral turpitude . . . .

Code Section 4749.04, *supra*, also establishes several other grounds for which a private investigator's license may be suspended or revoked, each of which appears to be less pernicious than a felony conviction.

As pointed out in the Statement of the Case, *supra*, an administrative hearing was held pursuant to Section 119.09, Ohio Revised Code, to determine Petitioner's suitability to remain licensed as a private investigator in the State of Ohio. The Petitioner was given ample and lawful notice of said right to the hearing and of the hearing date, time and place. He participated during said hearing and was represented by counsel. Likewise, and contrary to Petitioner's Statement of the Case, certain very substantial and damning evidence against the

Petitioner's suitability to remain licensed was presented during said hearing. It was stipulated by counsel for both Petitioner and Respondent that Petitioner had been indicted for and pleaded guilty to the aforementioned felony, to wit: attempting to make an illegal wiretap as well as attempting to procure another to commit the same offense. It was also stipulated during said hearing that Respondent had both the grounds and the authority to revoke Petitioner's license. Thus, the one and only *material fact* necessary to support the Respondent's Adjudication Order rendered herein was clearly proven, by stipulation, and without any dispute whatsoever. Likewise, and as the Respondent pointed out in his Adjudication Order, Petitioner not only committed a felony but he committed said felony in the course of conducting his business.

It was on this basis that Respondent revoked Petitioner's license. There is no question but that the Respondent's Adjudication Order was rendered in an authorized, lawful and procedurally proper manner, nor, is there any question but that the *material fact* supporting such Order is undisputed. Said Order has been reviewed by all three tiers of the Ohio court system and each has agreed in this respect, *i.e.*, proof by the required quantum of evidence.

B. SECTION 119.09, OHIO REVISED CODE, IS CONSTITUTIONAL, IN THAT IT PROVIDES A HEARING PROCESS WHICH COMPORTS WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The first material issue before this Honorable Court is whether Section 119.09, Ohio Revised Code, generally comports with the Due Process Clause of the Fourteenth

Amendment to the United States Constitution. Certain of Petitioner's arguments in this respect are quite vague and unsupported by concrete instances or authority. Admittedly, the constitutional concept of due process of law is rather evasive. For this reason it would be helpful to refer to the words of Mr. Justice White, writing for the majority in a very recent case involving due process:

> 'Once it is determined that due process applies, the question remains what process is due?' *Morrissey v. Brewer, supra,* at 481. We turn to that question, fully realizing as our cases regularly do that the interpretation and application of the Due Process Clause are intensely practical matters and that 'the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961).
>
> *Goss v. Lopez,* No. 73-898 (U.S., decided Jan. 22, 1975), *at* 12.

In comparing the procedures employed in the instant action it is clear to see that Petitioner was afforded the fundamental fairness to which he is entitled and, perhaps, to a much greater degree than would actually be required.

Petitioner's first specific argument concerns the role of the Hearing Officer employed herein. First, he complains that he cannot receive a fair and impartial hearing from a Hearing Officer appointed pursuant to Section 119.09, Ohio Revised Code. Then, he complains because the Respondent did not adopt the Hearing Officer's recommendation as to the penalty to be imposed.

The role of the Hearing Officer appointed pursuant to Section 119.09, *supra,* is neither novel nor unconstitutional. For the purpose of analysis, one may compare the Ohio scheme to that contained in the Federal Administrative Procedures Act in that, although they are

not exactly alike, they are closely akin. *See*, 5 U.S.C. §§ 556 and 557.

Said Hearing Examiner is not the captive which Petitioner seems to imply. He must be an attorney and is required to conduct the hearing in accordance with the provisions of Section 119.09, Ohio Revised Code. Upon review, one can readily ascertain that said hearing must be conducted in a manner which comports with the requirements of Due Process of Law.

Subsequent to the administrative hearing described above, the Examiner prepares and submits to the agency involved a written report wherein he sets for his Findings of Fact. Conclusions of Law and a recommendation as to the action he believes should be taken by the agency. Then, according to Section 119.09, Ohio Revised Code, said recommendation of the Examiner may be approved, modified, or disapproved by the administrative agency involved. Thus, the employment and role of the Hearing Officer involved, does not, in any manner infringe upon Petitioner's right to Due Process of Law.

This brings us to Petitioner's other complaint, *i.e.*, that the Respondent did not adopt the Hearing Officer's recommendation *in toto*. Without saying more, one could argue that the Respondent could not be *required* to accept the Hearing Officer's recommendation as this would in all likelihood constitute an unlawful delegation within the Ohio statutory framework. *See generally*, K. Davis, Administrative Law Text, Section 9.01 (3rd ed., 1972). However, for the sake of comparison it is appropriate to examine the words of Professor Davis who, in discussing the role of the Hearing Officer pursuant to the Federal Administrative Procedures Act, states as follows:

> Of course, examiners are subordinates. The power is in the agencies, not in the examiners. Every deci-

> sion by an examiner . . . is subject to reversal by the agency. K. Davis, *supra*, Section 10.03.

In support of this, Professor Davis further states as follows:

> The key to the power of examiners to make decisions is a clear provision of Section 557 of the Administrative Procedures Act: . . . that the examiners may make an initial or recommended decision does *not withdraw any* power from the agency. Although the Administrative Procedures Act speaks of both 'initial' decisions and 'recommended' decisions by examiners, both are necessarily in the nature of recommendations, since 'the agency has all the powers which it would have in making the initial decision.' K. Davis, *supra*, Section 10.04.

Thus, the Hearing Examiner's role within the Ohio scheme is similar to that employed under the Federal scheme. His two major functions are to conduct hearings in a fair manner and thereafter, to make his report to the agency involved. Again, his role is that of recommending and not ultimately deciding. Thus, although Professor Davis' analysis was of the Federal Administrative Procedures Act, his thoughts are clearly applicable to the Ohio scheme. *See generally*, K. Davis, Administrative Law-Cases-Text-Problems, 192, 194 (1960); K. Davis, Administrative Law Text, Section 10.07, *supra*; Vol. 2, K. Davis, Administrative Law Treatise, Section 10.03 (1958).

C. THE RESPONDENT'S ADJUDICATION ORDER WAS NOT ARBITRARY NOR WAS IT THE PRODUCT OF PERSONAL BIAS OR CONFLICT OF INTEREST.

In reviewing the authorities which Petitioner cites at page six of his Petition it is apparent that they are

clearly distinguishable or that they actually support the actions taken by the Respondent herein.

First, it is clear that the Respondent did not unconstitutionally comingle the Prosecutor and Judge roles. The Respondent's agents prosecuted the case and the Respondent ultimately rendered the Adjudication Order at issue herein.

Secondly, the Respondent's Order is, without question, not arbitrary in that there is absolutely no dispute that Petitioner committed the felony for which his license was revoked pursuant to Section 4749.04, Ohio Revised Code.

Thirdly, the relationship between the Petitioner and Respondent herein are totally dissimilar to those described in the cases which Petitioner cites in support of his arguments pertaining to bias. *See, Narragansett Racing Association v. Kiernan*, 194 Atlantic 692 (1941); *National Labor Relations Board v. Donnelly Garment Company*, 67 S. Ct. 756 (1947). In the instant action there was no preexisting relationship between the parties such as was the situation in *Narragansett Racing Association v. Kiernan, supra*, where, prior to the hearing, the Appellant had called the Commissioner involved a "god damned liar", which was argued to have resulted in bias. Nor, is this a situation in which the Petitioner alleges an improper refusal to admit testimony as in *N.L.R.B. v. Donnelly Garment, supra.* Likewise, the Petitioner can not argue that the Respondent was biased because he had a pecuniary interest in the outcome of the proceedings. *See e.g., Gibson v. Berryhill,* 411 U.S. 564 (1973).

Finally, it is fair to argue that the Director was in no way personally biased against this Petitioner. The Respondent's action was *not* unlawful, unreasonable, arbi-

trary or capricious. He acted pursuant to his statutory duties and authority, *i.e.*, Section 4749.04, Ohio Revised Code, and carried out said actions in a procedurally lawful manner, *i.e.* pursuant to Chapter 119., Ohio Revised Code. An act which is in accordance with law can not, contrary to Petitioner's views, be deemed an abuse of discretion. The Respondent's very cogent and compelling reasons for revoking the Petitioner's license are clearly stated in Respondent's Adjudication Order. *See*, Adjudication Order, *at* Petition, pages 11 through 13.

II. THE PUNISHMENT INVOLVED IS NOT VOID IN THAT IT IS THE LAWFUL PRODUCT OF A VALID ADJUDICATION ORDER AND WAS RENDERED PURSUANT TO STATUTE — NOT A RULE.

Petitioner's second argument pertaining to "void punishment" is entirely without merit. Section 4749.04 (B) dictates that a private investigator's license may be revoked when said licensee has been convicted of committing a felony. The Petitioner, a licensee subject to that statute, was convicted of committing a felony and his license was revoked pursuant to the dictates of said statute. Said punishment is not the personal creation of the Respondent herein nor is it the product of rule — it is the product of an adjudication hearing and order and is clearly based upon a statute lawfully enacted by the State Legislature, to wit: Section 4749.04 (B), Ohio Revised Code.

III. THE PETITIONER HAS NOT BEEN TWICE PUNISHED FOR THE SAME OFFENSE.

This Honorable Court should reject out-of-hand all of Petitioner's arguments pertaining to double punishment. Said arguments can in no way be considered properly before this Court. This Court has never incorporated

Article I, Section 10, of the Ohio State Constitution into the Fourteenth Amendment to The United States Constitution. Petitioner alleges that it should be so incorporated but cites no authority in support thereof. Thus, it is not a proper question for review under either Rule 19 of the Supreme Court Rules or 28 U.S.C. § 1257 (3).

Assuming *arguendo*, that all of Petitioner's surface conclusions pertaining to both facts and law are proper, his reasoning remains faulty in that his most basic underlying premise is unsound. That is because the aforementioned citation to the Ohio Constitution according to Ohio law, encompasses only criminal offenses and not civil wrongs. *See, e.g., State v. Preston*, 20 O. App. 2d 333, 49 Ohio Op. 2d 456, 253 N.E. 2d 827, relating to an attempt to twice incarcerate the Appellant in the Ohio State Penitentiary for the same offense. Without question, the instant action was not in any sense a criminal proceeding nor was any criminal penalty imposed — the above proceedings were purely civil in nature.

Furthermore, Petitioner was not twice punished even in a civil law sense. His license was revoked *ab initio*. When the Petitioner's penalty was improperly modified by the lower Court, said improper modification was properly and timely appealed to the appropriate Ohio Court by the Respondent herein. The Respondent never attempted to enforce said improper penalty and any statements Petitioner makes to the contrary are totally irrelevant. The final, lawful and only order which the Respondent ever attempted to enforce was that which was originally imposed, *i.e.*, revocation.

Finally, if Respondent's argument herein needs further support, it should be pointed out that the purpose of the administrative hearing held herein was not to enforce the Criminal Code, but rather was a proceeding instituted to protect the public from unfit private investigators.

CONCLUSION

Respondent respectfully submits that a Writ of Certiorari should not issue in the instant proceeding. Petitioner has received a fair and impartial hearing, the elements of which fully comport with the Due Process guarantees contained in the Fourteenth Amendment to the United States Constitution. The ultimate Adjudication Order issued herein, was rendered in full compliance with all of Petitioner's procedural rights and the same was *not* the product of personal bias, as Petitioner alleges, nor was it the product of any conflict of interest.

Likewise, the punishment which Petitioner received was imposed pursuant to statute and not pursuant to any rule as Petitioner argues. Said punishment was imposed subsequent to an adjudication hearing in which all relevant and material facts were either proven or agreed to by stipulation.

Finally, it is beyond cavil that Petitioner was not, in either a constitutional or factual sense, twice punished for the same offense.

Based upon the foregoing, Respondent respectfully submits that this Honorable Court should refuse to grant a Writ of Certiorari in the instant action.

Respectfully submitted,
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